

1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part I)

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On 13 January 2016, exactly three years ago today, the Commission activated the so-called rule of law framework for the very first time with respect to Poland. This was [justified by First Vice-President Timmermans](#) primarily with regard to the situation of the Constitutional Tribunal and the fact that some of its key binding rulings were not being respected.

In the subtle and respectful manner that has characterised it ever since, the Polish government accused the First Vice-President of “a lack of knowledge” and advised him “to exercise more restraint” in the future “despite the ideological differences that may exist between us, with you being of a left-wing persuasion” (letter from the Minister of Justice dated 11 January 2016 on file with the authors).

Fast forward to 13 January 2019, the rule of law situation is worse than ever. A recent tactical retreat à la Orbán notwithstanding, the *modus operandi* of Polish authorities has remained largely the same during this period: they repeatedly deny the obvious and hide behind specious historical-cultural and double-standards arguments while accusing “Brussels” of being an ignorant and/or dishonest broker. To quote a [recent interview of Poland's prime minister](#),

people from Brussels completely do not understand the situation in post-communist countries... Just as every country has their challenges, so we have our challenges with the judiciary that hasn't been reformed for the last 30 years ... if [the Commission wants] to be an honest broker, because I don't feel so far that they are an honest broker ... they should really take decisive positive steps to clarify all these issues they have, because now we have done so much.

As will be shown below, Polish authorities have done nothing of the sort with every single major rule of law breach committed by Polish authorities over the course of the past three years comprehensively documented, clearly explained and rightly denounced by the Commission and a plethora of major rule of law bodies, which are just too many to be listed here. As things stand today, Polish authorities' sustained and systematic attacks on the rule of law now more than ever directly threaten the very functioning of the EU legal order.

1. Four Rule of Law Recommendations for nothing

The first Commission recommendation regarding the rule of law in Poland was adopted on [27 July 2016](#). No less than three (!) complementary recommendations followed on [21 December 2016](#), [26 July 2017](#) and [20 December 2017](#).

Each of these four documents contained a specific list of actions which have remained largely focused on the same issues and which can be quickly summarised as follows:

1. To ensure the judges, its President and its Vice-President of the Polish Constitutional Tribunal are lawfully elected and appointed so as to restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution;
2. To publish and/or fully implement a number of rulings of the Constitutional Tribunal before its 'capture' by the Polish ruling party in December 2016 in obvious breach of the Polish Constitution;
3. To ensure that the following laws are withdrawn or amended so as to ensure their compatibility with the Polish Constitutional and with basic European standards on judicial independence: the law on the Supreme Court; the law on the National Council for the Judiciary; the law on Ordinary Courts Organisation and on the National School of Judiciary;
4. To refrain from actions and public statements which could undermine further the legitimacy of the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole;
5. To ensure that any justice reform upholds the rule of law and complies with EU law and the European standards on judicial independence and is prepared in close cooperation with the judiciary and all interested parties

Why the lack of any results whatsoever under the Commission's rule of law framework? As Professor Kochenov and one of the present authors [predicted before it first ever activation](#), this instrument adopted in 2014 was bound to fail as dialogue – structured or otherwise – in any situation where “the ruling élite has made a conscious choice not to comply with EU values,” is a recipe for wasting time.

In this situation, the framework only offers more time to authorities acting in bad faith and bent on dismantling all checks and balances to do so in relative peace with the Commission tempted to hold off on infringement actions (as it did for far too long), and other EU institutions and EU national governments all too happy to look the other way. The only positive outcome in the case of Poland is that the rule of law framework resulted in the accumulation of overwhelming, damning evidence of a deliberate attempt by Polish authorities to undermine the rule of law in order to progressively transform the country into a *de facto* autocratic one-party state in a similar fashion to what has been done in Hungary, a country which can be considered the EU's first consolidated “[competitive authoritarian regime](#)”.

2. Three Article 7 hearings with no tangible results to date

As one of us [wrote on this blog in October 2016](#), “considering the overwhelming evidence of a deliberate governmental strategy of systematically undermining all checks and balances in Poland as well the uncooperative behaviour of Polish authorities”, the Commission ought to trigger Article 7(1) in order for national governments, meeting in the Council, “to step up to their responsibilities to isolate, if not to sanction a member state whose authorities are actively seeking to dismantle liberal democracy in their country.”

At long last, Article 7(1) was activated for the very first time [on 20 December 2017](#) (the Commission’s reasoned proposal should not be confused with the 4th rule of law recommendation which was also adopted on the same day).

One year later, what tangible results can we point out to? Sadly, none.

What we have seen instead is the repetition *ad nauseam* by the Council (General Affairs) that dialogue is good and/or must be pursued, with three formal hearings organised to date on the basis of documents which are not however automatically made public either before or after each hearing:

27 February 2018: “We encourage the continuation of the dialogue between the European Commission and Poland”

20 March 2018: “Ministers expressed the hope that the dialogue between the Commission and the Polish authorities will bring positive results on the issue”

17 April 2018: “Ministers encouraged the Commission and the Polish authorities to continue their dialogue with a view to achieving concrete results”

14 May 2018: “The Commission updated ministers on the latest developments in its dialogue with the Polish authorities. The Council will return to this issue at its next meeting”

26 June 2018 (first formal Article 7(1) hearing): “The hearing offered a possibility for ministers to have an in-depth exchange with Poland on the concerns identified in the Commission’s reasoned proposal”

18 September 2018 (second formal Article 7(1) hearing): “Ministers continued their in-depth exchange with Poland on the concerns identified in the Commission’s reasoned proposal under Article 7(1) TEU”

16 October 2018: “Ministers reiterated the importance of upholding the rule of law in all EU member states and stressed the need to achieve tangible progress. The Council will come back to this matter”

12 November 2018: “The Commission provided the Council with an update on the latest developments regarding judicial reform in Poland”

11 December 2018 (third formal Article 7(1) hearing): “The Council will continue the Article 7(1) TEU proceedings concerning Poland under the Romanian presidency”

Early evidence however suggests that one can expect more disgraceful procrastination under the [Romanian presidency](#), whose [own website](#) indicates a lack of familiarity with the very concept of the rule of law which is nowhere to be seen despite “Europe of Common Values” being allegedly the fourth priority of the Romanian presidency.

Be that as it may, one key take from the documents which have found their way in the public domain is that Polish authorities, after repeatedly misleading the European Commission, did not shy away from doing the same with its peers. To give a single but characteristically absurd argument submitted to the attention of fellow national governments (via a PowerPoint presentation), the Polish government claimed that it was legally unobjectionable to replace the sitting First President of the Polish Supreme Court notwithstanding the obvious breach of the relevant provision of the Polish Constitution regarding her terms of office because – we kid you not – the previous First President was replaced when “his six-years [sic] term ended prematurely with his death in 2014”...

Despite the apparent lack of tangible results, the Commission was right to activate Article 7(1) TEU. As argued in this [post](#), “the intensity and repeated nature of Poland’s ruling party’s attacks on the most basic tenets of the rule of law” warranted the activation of Article 7. It has finally forced EU national governments to confront the situation and it has enabled us, despite much secrecy, to finally know which governments take the rule of law seriously and which ones do not. In addition to the not surprising support of Orbán’s regime, itself subject to [another pending Article 7\(1\) procedure](#), and the quieter but still supporting stance of Bulgaria and Romania – themselves subject to a [specific rule of law monitoring process](#) since 2007 – it was disappointing to [see the UK government](#) thinking that the Polish government support over Brexit is worth sacrificing its previously strong pro-rule of law stance.

If we had one practical recommendation to make it would be for the Council to be more transparent when it comes to the practical modalities of Article 7(1) hearings and connected documents. The least we can indeed expect is full transparency when it comes to a country’s potential systemic failure to comply with the basic principles governing access to the EU in the first place. It is rather strange in this respect to see the EU being more transparent when it comes to a country withdrawing from the EU. This is why the Council ought to systematically and promptly publish any document it produces or has received from the Commission and/or any national government with respect to the ongoing Article 7 procedure. And in the absence of any Council’s assessment of the substance of the rule of law issues identified by the Commission, let us offer our own: every single one of the rule of law issues identified by the Commission is not only entirely relevant but also has been adequately evidenced over and over again. Every single one

of them is yet to be adequately addressed. The only 'progress' to date concerns the Polish authorities' attempted purge of the Supreme Court. It was however only (provisionally) averted because of a judicial defeat and not because of Article 7 proceedings or Polish authorities finally deciding to comply with the principle of sincere cooperation.

3. Two Polish infringement defeats

Before mentioning the recent order of the ECJ demanding the immediate suspension of the application of the Polish legislation relating to the retroactive lowering of the retirement age for Supreme Court judges ([Commission/Poland, C-619/18 R](#)), it is worth stressing this is not the first time the ECJ had to step in and not the first time the ECJ was faced with threats and bullying tactics from Polish authorities.

In November 2017, Polish authorities were ordered by the Court to immediately cease logging in the Bia#owie#a Forest subject – for the very first time – to a penalty payment of at least €100,000 per day in case of non-compliance ([Commission/Poland, C-441/17 R](#)). Why this unprecedented order? Because the Polish government – also for the very first time – previously publicly and rudely refused to comply with a previous order of the Court [with the then Polish environment minister adding](#) that “[we will not be insulted by those who don't know about the rules of protection of environment](#)”. No wonder the Court then had to take an unprecedented step as this was a direct and present threat to the effective application of EU law, which, as the Court noted, is “an essential component of the rule of law, a value enshrined in Article 2 TEU”.

Bis repetita in 2018 with another round of non-compliance threats but this time made even before the Court's first provisional order, with Poland's deputy prime minister stating that Poland could ignore a ruling against it. Following the adoption of a provisional order of the ECJ Vice-President on 19 October 2018, reactions were however more muted [with Jaros#aw Kaczy#ski saying](#) that “the ECJ's decision is preliminary. We will appeal against it” (NB there is no such appeal against ECJ orders), and [President Duda stating](#) that the ECJ “went too far” (how and to what extent no one knows).

The apparent climb-down widely reported in the international media is nothing of the sort. Yes, it was humiliating for Polish authorities to have to accept the “return” of judges they had publicly declared “retired”. However, the set of amendments adopted last November seemingly to enforce the ECJ order – which in fact was not needed since the interim measure produces immediate legal effects, [as ECJ President confirmed](#) – is just a tactical retreat containing the seeds of future backsliding (it is also an attempt to “kill off” some crucial pending preliminary reference cases originating from Polish courts: see part II of this post for more details).

[As noted by the PiS chairman of the parliamentary justice committee](#), “sometimes you have to take one step back to take two steps forwards. The reform will certainly be completed.” While seemingly admitting defeat, [the Polish President has however](#)

[ominously stated](#) that the ECJ order “needs to be executed regardless of the discussions on whether such a ruling should have or could have been made by the CJEU, and whether this ruling exceeds the treaty competencies of the CJEU”. Adding insult to injury, he could not refrain from violating (again) one of the Commission’s repeated recommendations to stop attacking judges [when he stated](#) that “significant people in the judiciary... overtly violate the effective law and constitutional provisions and disregard the binding legislation, then we are dealing with anarchy by the representatives of the judiciary.”

This is not a little rich coming from the violator-in-chief of the Polish Constitution and one of the key architects of the slow-motion “constitutional *coup d’état*”, [to borrow from Professor Sadurski](#), we have been witnessing in Poland. It also shows beyond any doubt that the current Polish authorities will not back down and back away from their attempt to annihilate the rule of law and replace it with the rule of the ruling party under the guise of the will of the “people”. The way the amendments were incredibly rushed – the bill was introduced by MPs so as to bypass public consultations and the whole legislative process completed in 2 days 10 hours 30 minutes – and the ludicrous delay to get the act published in the Official Journal – while adopted on 21 November, the law was not published until 31 December 2018 – show the persistent disrespect towards the most elementary understanding of the rule of law and the Commission’s repeated recommendations, one of which was that any “justice reform is prepared in close cooperation with the judiciary and all interested parties”. Having sat on the act for more than 8 weeks, it is difficult to see why more time was not spent consulting relevant stakeholders.

Be that as it may, it is important to remember we have been here before. In the case of Hungary, as outlined in [this 2016 article](#) by Professor Batory, “none of the concessions prevented the Hungarian government from achieving its partisan goals. Commission action amounted to little more than chipping away at the edges of a new constitutional order cementing a single political party’s hold on political power in an EU member state.”

It is to be hoped key actors have learned their lessons from the past failures to stop Hungary’s descent into full blown authoritarianism. To avoid a similar fate with respect to Poland, we will offer some brief recommendations at the end of part II of this post. But to put it briefly, now is not the time for the Commission to stop bringing infringement actions and for the Council to stop questioning Polish authorities on how they intend to *promptly* and *meaningfully* comply with the multiple problems identified by the Commission in its Article 7 proposal, with all but half one (regarding the Supreme Court) yet to be complied with:

- While the Law on the Supreme Court has been amended, this has had no impact on the prior packing of the Court with most of the new “judges” appointed to the modern equivalent of “[star chambers](#)” (i.e., the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber), on the back of a procedure which lacks legal basis as the President did not obtain the Prime Minister’s countersignature when he published vacant seats in the Supreme Court;

- Poland continues to be deprived of effective constitutional review following the unconstitutional capture of the Constitutional Tribunal in December 2016 and the refusal of Polish authorities to comply with key rulings of the pre-captured Tribunal;
- The law on the Supreme Court, the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary (KRS) and the law on the National School of Judiciary have yet to be amended in such a way as to ensure their compliance with the requirements relating to the independence of the judiciary, the separation of powers and legal certainty;
- Polish authorities have persistently failed to ensure that any justice reform is prepared in close cooperation with the judiciary and all interested parties, including the Venice Commission;
- They have similarly persistently failed to refrain from actions and public statements attacking courts and judges which refuse to uphold the will of the party over Poland's constitutional and EU law obligations.

By the way, it would appear that logging in the Bia#owie#a site [has recently resumed](#) while the Polish Minister of Justice has renewed past threats not to comply with ECJ rulings [stressing on 31 December 2018](#) that Polish authorities would only comply with “rulings that are in line with our Constitution”. This obviously means in line with what the ruling party thinks the Constitution should guarantee, not what the actual Constitution provides.

So much for the new spirit of compliance some detected a couple of weeks ago.

